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No. 706

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

BEN WEST, ET AL.,
Appellants,
vs.
JOE C. CARR, ET AL.,
Appellees.

NO. 37670

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES

BEN WEST, ET AL., *Appellants,* vs. JOE C. CARR, ET AL., *Appellees.*	NO. 37670 IN THE SUPREME COURT OF THE STATE OF TENNESSEE

JURISDICTIONAL STATEMENT

This is an appeal by Ben West, as Mayor of the City of Nashville, Tennessee, and as an individual voter and taxpayer residing in Davidson County, Tennessee, from an opinion of the Supreme Court of the State of Tennessee in the above styled and numbered cause, which is published unofficially at 370 S.W.2d. 469. This statement is submitted by the appellant to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

OPINION BELOW

The unofficial report of the opinion of the Supreme Court of the State of Tennessee is reported at 370 S.W.2d. 469, and is attached to this jurisdictional statement as Appendix A, infra, at page 17. The Opinion of the Chancery Court of Davidson County, Tennessee, which was reversed by the Supreme Court of the State of Tennessee is attached to this statement as Appendix C, infra, at page 34.

JURISDICTION

1. The proceeding is an appeal where is drawn in question the validity of a statute of the State of Tennessee on the ground that it is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, the decision of the Supreme Court of Tennessee, from which appeal is had, being in favor of the validity of the Tennessee Constitution.

2. The decree sought to be reviewed was made and entered by the Supreme Court of the State of Tennessee on May 10, 1963. An order denying appellant's petition for a re-hearing was made and entered on September 11, 1963. Notice of appeal was filed in the Supreme Court of Tennessee on October 9, 1963. An extension of time for filing the jurisdictional statement was granted on December 6, 1963, extending the time for filing until December 26, 1963.

3. Section 1257, Title 28, U.S.C., subsection (2), permits review by the Supreme Court of the United States of a judgment or decree of the Supreme Court of Tennessee by appeal, in a case in which the validity of a state statute is questioned for its repugnancy to the Constitution of the United States and decision in favor of the validity of the questioned statute is rendered by the Supreme Court of Tennessee.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Baker v. *Carr*, 369 U.S. 669
Nixon v. *Herndon*, 273 U.S. 536
Terry v. *Adams*, 345 U.S. 461
Morey v. *Doud*, 357 U.S. 457
Gomillion v. *Lightfoot*, 364 U.S. 339
Hill v. *Texas*, 316 U.S. 400
Smiley v. *Holm*, 285 U.S. 355

STATUTE INVOLVED AND CONSTITUTIONAL PROVISION

The validity of Chapter 2 of the Acts of the First Extraordinary Session, 82nd General Assembly of Tennessee, 1962, is involved. Said statute provides for the conducting of an election by the defendants on the question of whether a Constitutional Convention should be called and held for the purpose of altering, reforming, amending or abolishing certain provisions of the Constitution of Tennessee and with respect to the manner of representation of the appellant and all the people of the State of Tennessee to the General Assembly of Tennessee. A copy of said statute is attached to this statement as Appendix B, infra. Said statute attacked violates United States Constitution Amendment XIV, SS1.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether Chapter No. 2 of the Acts of the first extraordinary session, 82nd General Assembly, State of Tennessee, 1962, a statute calling a Constitutional Convention to propose amendments to the State Constitution, abridges the Fourteenth Amendment to the United States Constitution because the statute apportions the membership of the convention on the basis of an invalid 1901 legislative apportionment formula rejected by the Federal Courts in *Baker* v. *Carr*, 369 U.S. 663, considered on remand, *Baker* v. *Carr*, 206 F.Supp. 341?

2. Where the established method for changing a state constitution is by a legislative process calling for a representative assembly or Constitutional Convention whose proposals the voters have only the negative power to accept or reject in referendum, does the Four-

teenth Amendment to the United States Constitution permit the membership of the Constitutional Convention to be based upon a method of apportionment specifically designed to discriminate against a large class of the state's population?

STATEMENT OF THE CASE

This action was brought by appellant, as Mayor of the City of Nashville, Tennessee, and as a qualified voter and taxpayer of the State of Tennessee, in the Chancery Court of Davidson County, Tennessee, against the defendant election officials to invalidate a state statute which denies to the appellant, and all others similarly situated, rights guaranteed to them by the Constitution of Tennessee and by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States

Said Legislative Act provides, that upon a favorable vote of the people, a Constitutional Convention be held in the year 1965, which shall be held to alter, reform, or abolish the following provisions and subject matter of the Constitution of Tennessee, to wit: Article II, Sections 3, 4, 5, 6, 7, 8, 11, 15, 16 and 23, relative to the Legislative department of state government; its authority and terms of office; the methods and means of apportioning the representatives and senators of such department; the time of holding elections for such offices; the time for legislative meetings and the inauguration of the Governor; policies, quorum, and adjournments of each such House; filling of vacancies for such offices; limitations upon power of adjournment of such Houses; and the compensation of members of such department; and of Article III, Section 18, relative to the Governor's veto power; which con-

vention shall be limited to consideration of and action upon these sections and the subject matter hereinabove set forth.

The Act provides that the apportionment of the 99 members of the Constitutional Convention shall be in accordance with the legislative apportionment for the 99 members of the lower House of the General Assembly of Tennessee existing in the State of Tennessee at the time of the passage of the Act. The apportionment of the lower House at the time of the passage of the Constitutional Convention Act followed the Act of Apportionment of 1901, Sections 3-101-106, Tennessee Code, the same act reviewed in *Baker* v. *Carr*, 369 U.S. 663, and upon remand in *Baker* v. *Carr*, 206 F.Supp. 341 (D.C. Tenn.), and further proceedings ___ F. Supp. ___ D.C. Tenn.), Opinion, October 10, 1963.

Upon remand in *Baker* v. *Carr* and before the passage of the Constitutional Convention Act, the Act of Apportionment of 1901 was conceded by the same defendants to be constitutionally indefensible under the Fourteenth Amendment to the Constitution of the United States in a pre-trial conference.

> ". . . There can be no doubt that the majority of the Supreme Court ruled in this case, as stated by Mr. Justice Clark, at least *sub silentio*, that invidious discriminations were present in the 1901 reapportionment statute and that it fell far short of the standards of the equal protection clause. This was the view of the defendants at the pre-trial conference when they stated that they would not attempt to defend the 1901 statute.
>
> The question before us is whether the invidious discriminations, obviously present in the 1901

statute, have been removed by the 1962 reapportionment statutes . . .'

Baker v. *Carr*
206 F.Supp. 341, 345"

In effect, the Constitutional Convention Act provides for an apportionment of delegates to a State Constitutional Convention in accordance with a method of apportionment which was conceded by the defendants to be unconstitutional for legislative apportionment.

The portions of the Tennessee Constitution which provide for the calling of a Constitutional Convention are set out in Appendix D, infra. There is no provision thereunder fixing the number or the apportionment of delegates to the Constitutional Convention in Tennessee. Under the Constitution of the State of Tennessee, the Legislature of the state establishes the number and apportionment of the delegates.

The gist of appellant's complaint is that the apportionment of delegates to the Constitutional Convention in question is on an irrational, invidiously discriminatory basis, without rhyme or reason, built upon the same "crazy quilt pattern without rational basis" as described by Mr. Justice Clark in his concurring opinion in *Baker* v. *Carr*, 369 U.S. 663, 715.

Precisely the same 1901 apportionment formula for the lower House, rejected in *Baker* v. *Carr*, is used for the Constitutional Convention; and the decision of the Supreme Court of Tennessee, therefore, appears inconsistent with the decisions of the Federal Courts.

The Constitutional Convention Act provides for arbitrary, capricious and invidious discrimination against the appellant in that some twenty-four (24) counties in the state are entitled to elect delegates to the Convention, when they should not be entitled to

elect delegates by any population basis or standard, or any other standard, which can be rationally justified. This is undecided in the record.

Appellant, being a resident of Davidson County, Tennessee, would be entitled to elect eleven delegates rather than six delegates allotted by said Act, if the convention were apportioned on an equal population basis. The same principle is true regarding the other major counties of the State of Tennessee wherein Hamilton County, rationally entitled to six direct representatives, had but three; Knox County, entitled to seven direct representatives, had but three; Sullivan County, entitled to three direct representatives, had but one, and Shelby County, entitled to seventeen direct representatives, had but eight seats in said House of Representatives.

The complainant and other qualified voters and taxpayers similarly situated throughout the State of Tennessee in Davidson, Shelby, Knox, Hamilton, Anderson, Carter, Campbell, Bradley and Hamblen counties, by said Chapter 2 of the Acts of 1962, would be disenfranchised and their votes would be, on the average, 1 10th as effective as the vote granted to those qualified voters residing in the favored counties of Tennessee permitted and required to elect a majority of the delegates to said Constitutional Convention by virtue of the admittedly unconstitutional malapportionment provisions of said Acts of 1901.

There is no purpose served by enumerating in detail the provisions of the 1901 Act of Apportionment, which are set forth in detail in *Baker* v. *Carr*, 369 U.S., at p. 697, nor is there any benefit to be gained out of presenting again the population figures which are so thoroughly reviewed by Mr. Justice Clark in *Baker* v.

Carr, 369 U.S. 711. However, as an example of the discrimination practiced, certain figures are taken from the 1960 Federal Census, which the Court may judicially notice, 20 Am. Jur., *Evidence*, Sec. 98, p. 112.

By reason of the void Act of 1901, 3-101, et seq., Tennessee Code Annotated, as adopted by reference by the Act attacked, Moore County is entitled to elect a delegate with 2,158 qualified voter under the 1960 Federal Census, whereas Hamblen with 19,465 qualified voters, Anderson with 33,554 qualified voters, Carter with 25,907 qualified voters, Campbell with 15,414 qualified voters, and Bradley with 21,881 qualified voters, are not entitled to elect a delegate: Twenty-two counties with less qualified voters than the five counties listed above would have a delegate, many with 1/4th or less of the qualified voter population of the five listed. Another example would be: Jackson County with 5,578 qualified voters, Smith County with 7,654 qualified voters and Cannon County with 5,235 qualified voters, three adjoining counties in Middle Tennessee, with a total of 18,467 qualified voters elect a total of three delegates, and Hamilton County with 142,979 qualified voters elects only three delegates.

Because the composition of delegates to said Constitutional Convention would be based upon an irrational apportionment of delegates, said Chapter 2 of Acts of 1962 would result in less than 1 3rd of the qualified voters of the state electing over 2 3rds of the delegates to said Constitutional Convention.

The Chancery Court for Davidson County, Tennessee, the Court of original jurisdiction, found as follows:

"I am of the opinion that said Chapter 2 is un-

constitutional. In Baker vs. Carr, Chapter 122, Public Acts 1901 was declared void. In the enactment of Chapter 2 the Legislature passed, in effect, another Chapter 122, Public Acts 1901. The membership of a Constitutional Convention is just as important as the membership of the Legislature. If the malapportionment is void as to the Legislature, it is also void as to a Constitutional Convention."

The Supreme Court of the State of Tennessee reversed and dismissed the complaint, finding, in essence, that the complainant could not show any harm by reason of the said apportionment of the Constitutional Convention, because said convention does not enact law, but submits back to the people certain proposals which must be favorably voted upon by the people before said proposals can become law. The Court was of the opinion that neither the delegates nor the convention take any final action, but can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large. Therefore, the Court found that complainant's bill did not state a controversy as to present rights under either the State or Federal Declaratory Judgment Act, or State or Federal Constitutions and that the claim asserted by the complainant involved only a potential invasion of his rights.

SUMMARY OF ARGUMENT

Under the Tennessee Constitution, the sole power to initiate constitutional changes rests with the Legislature of the state, which at the time of the passage of the act attacked, was apportioned in an admittedly unconstitutional manner. There is no provision for a

referendum or initiative. The Legislature of the State of Tennessee has sole and complete power to propose which portions of the Constitution shall be altered, amended or reformed. In this case, such proposals are set forth in Section I of the Legislative Act attacked.

Thereafter, a three-step process is involved:

1. Said legislative act must be submitted to a vote of the people at a general election, and must receive a favorable majority in order that a convention be called.

2. The delegates to the convention meet, and in accordance with enabling act, said convention has the sole and complete power to determine which proposals, in what form, and which manner, shall be submitted to the people for a vote of adoption.

3. At the next general election, the people must by a favorable majority vote, approve said proposals before they become a part of the Constitution.

To the extent that the voter is disenfranchised, he is not allowed to participate in the formative process of hammering out by traditional legislative methods the fundamental law of the state. He is denied the right to influence the positive or creative part of the law-making process, though he is given the negative power to cast his vote in opposition to the measures adopted. His interests are not taken into account in the formation of law. The element of accountability, the important substance of the legislative process, is missing.

Appellant's case is based on the proposition that he is entitled to a rational, non-discriminatory method of selection of delegates to the Convention, based on valid classification lines. It is at the convention, step two above, that all delegates debate, consider, frame and pass upon constitutional amendments. A Constitu-

tional Convention in Tennessee is a deliberative assembly, a representative assembly, the crucial and key part of the constitutional amendment process.

If the appellant, and others similarly situated, do not have the right to rational representation and a reasonably equal void in the assembly which passes upon his basic constitutional rights, said assembly has become the instrument to perpetuate and continue minority legislative rule so vigorously condemned by the three-judge Federal District Court in its opinions in *Baker* v. *Carr* upon remand, *supra*.

There is no valid classification or conceivable rational basis for the apportionment of delegates. The question was avoided. Appellant asserts that the crucial test of whether State legislative act violates the equal protection clause of the Fourteenth Amendment is whether there is any valid basis for the system or systems of classification found in the legislative act. *McGowan* v. *Maryland*, 366 U.S. 420.

Herein, the question is not whether there is any valid or rational basis to the admittedly discriminatory provisions of the legislative act—it is whether the discrimination is such as to constitute a real and present invasion of appellant's rights to have a reasonably equal voice at a critical step of the constitutional amending process.

As the learned Chancellor, below, found: "The membership of a Constitutional Convention is just as important as the membership of the Legislature. If the malapportionment is void as to the Legislature, it is also void as to a Constitutional Convention."

Two analogous lines of cases illustrate the concern of this Court with the proper protection of the individual's rights to equal protection of the laws at an

intermediate stage of legal proceedings. The first are in the cases prohibiting the denial of voting rights in a *primary* election such as *Nixon* v. *Herndon*, 273 U.S. 536, and culminating in *Terry* v. *Adams*, 345 U.S. 461, prohibiting discrimination in voting rights in the Texas Jay-Bird primary.

Denial of voting rights in a primary election, which is not a final election, is just as much a denial of equal protection as the denial of voting rights in the general election.

Another line of cases are those involving discrimination against certain groups in the selection of Grand Juries, wherein it has been consistently held by this Court that an individual in a criminal case is entitled to protection against discrimination in the selection of a Grand Jury which has indicted him. See *Hale* v. *Kentucky*, 303 U.S. 614, and extensive annotation in 82 L.E. 1053; also *Hill* v. *Texas*, 316 U.S. 400. His rights are not fully protected by a petit trial jury wherein discrimination was not practiced, if there had been discrimination in selection of the Grand Jury.

The teaching of the primary election and Grand Jury cases is that the individual has a right to protection from arbitrary state action at the *initial* or early *stages* of the process. His rights are not left to determination at the final stage, such as voting in the general election or trial by a petit jury. *He is entitled to protection against arbitrary classification and invidious discrimination before final action is taken.*

If the Constitutional Convention meets, it will consider more than apportionment. It will consider proposals for determining the powers of the two Houses of the Tennessee Legislature, wherein it might propose that the House be the sole body to pass on fiscal matters

or that the Senate be the sole body to pass on matters relating to the criminal laws. The convention has unlimited power within the frame of the call set forth in the Act. It is the body which determines the phraseology of the proposals, as well as the substance of the proposals. As so often found in legislative enactments, the question of whether a "shall" or a "may" is used becomes crucial in later constitutional interpretation. The people cannot understand the complexity and the fine points of legislative draftsmanship. It is only when the people have a representative voice in the crucial decision-making process of a Legislature or a Constitutional Convention that they receive adequate protection from discrimination. A later vote of the people for or against the proposals does not cure any defects.

Under the decisions of this Court, one cannot be heard to say to an individual who was denied a vote in a primary election because he was a Negro, that he was given a vote in the general election and all ills have been cured; nor can we say to a Negro who has never had a member of his race on the Grand Jury of a particular county, that his conviction by a trial jury, wherein Negroes have previously served, represents a valid conviction. The term "equal protection of the laws" becomes hollow phraseology if the people are left with nothing more than a negative vote against arbitrary and invidious classification and discrimination.

THE QUESTIONS ARE SUBSTANTIAL

There is *no* system of classification found in the legislative act attacked. It is totally irrational. This point has never been disputed by the appellees.

This appeal involves a state statute which provides for apportionment of a State Constitutional Conven-

tion in the same manner as provided for apportionment of the House of Representatives of the State Legislature, which apportionment has been conceded to be invalid for legislative purposes. The question presented goes to the fundamental rights of a citizen, voter, and taxpayer to a rational system of representation in the State Constitutional amending process. When less than one-third (1/3) of the voters of the state may elect over two-thirds (2/3) of the delegates to the Convention, has not the appellant been denied equal protection of the laws? His voice, as represented by his duly elected delegates, is diluted and rendered ineffective by the granting to others, on a crazy quilt basis, a much more effective voice.

Appellant, and others similarly situated in the major counties of the state, as well as some rural counties, are denied the opportunity to effectively participate in the decision-making process of a Constitutional Convention. Surprisingly, there is only one reported State or Federal case involving the apportionment of a State Constitutional Convention. Said case is *In Re: Opinion of the Justices*, 167 A. 176, Supreme Court of Maine, 1933. In that case, the Court held:

> "Although a convention is summoned by the Legislature, it derives its power from the sovereign people. *It has, accordingly, been the practice to have as delegates those fairly representing the political subdivisions of the state.* The Continental Congress summoned the different colonies 'to call a full and free representation of the people' for the purpose of organizing their governments. *This demand was answered by the summoning in every*

colony of delegates fairly apportioned according to population and location."

(Emphasis supplied)

In Re: Opinion of the Justices
167 A. 176, at p. *179*.

We have found no other Federal or State authority.

The appellant has been denied equal protection of the laws when the convention meets, assembles and begins its deliberations, since those who should not be entitled to representation on any rational basis will be given control of the convention. The convention will not represent the will of the people of Tennessee, but only a small minority thereof, representing those areas which have held domination of the processes of government in Tennessee for over sixty (60) years.

The Supreme Court of Tennessee took the position that the appellant would not be harmed by this procedure, inasmuch as the people of the state at large must vote on the proposals that emanate from the convention. The opinion fails to deal with the crucial proposition asserted in the original bill that the appellant is entitled to equal protection of the laws at an intermediate stage of the Conventional amending process.

The appellees have not undertaken to claim that there is any remote relationship of the statutory classification of delegate selection to the purposes of the Act which can be justified. As stated by this Court in *Morey* v. *Dodd*, 354 U.S. 457, 465, a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found. State legislative classifications must be rooted in reason. *Griffin* v. *Illinois*, 351 U.S. 72.

The state has selected a certain group for invidious

discrimination—the voters in the major urban counties of the state. It is respectfully submitted that this case falls within the traditional test of the equal protection clause, as stated by Justice Douglas in *Baker* v. *Carr*, 369 U.S. 186, 244:

> "The traditional test under the equal protection clause has been whether a state has made 'an invidious discrimination' as it does when it selects 'a particular race or nationality for oppressive treatment.'"

It should be noted that a decision in appellant's favor will not require extraordinary or unusual relief. There is no relief sought which would interfere with the normal processes of government. The Legislature would be free to propose another convention so long as the apportionment of delegates would be on a rational basis.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this petition from a judgment denying a basic constitutional right guaranteed by the equal protection clause of the Fourteenth Amendment of the United States.

Respectfully submitted,

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APPENDIX A

BEN WEST, MAYOR, ETC.
v.
JOE C. CARR, SECRETARY OF STATE, ET AL.

SUPREME COURT OF TENNESSEE.
May 10, 1963.

FELTS, Justice.

This suit was brought by Ben West, as Mayor of the City of Nashville and as a voter and taxpayer of Davidson County, under the Declaratory Judgments Act (T.C.A. §§ 23-1101 to 23-1113), seeking a decree declaring Chapter 2, Acts 1962, unconstitutional and enjoining the defendants, the Secretary of State, the Attorney General, and the Election Commissioners of Davidson County, from expending any public funds or holding the elections provided for by the Act.

This Act was passed June 7, 1962, at the extra session of the Legislature. It is an Act submitting to a vote of the people of Tennessee, in one of the modes prescribed by he Constitution of Tennessee (Art. 11, sec. 3, par. 2), proposals to alter, reform or abolish certain parts of the Constitution, to wit:

Article 2, section 3 (dealing with the Legislative Department and the terms of office of its members), sections 4, 5 and 6 (relating to apportionment of Legislative seats), section 7 (fixing time of elections of members of the Legislature), section 8 (fixing time of the session of the Legislature and inauguration of the Governor), section 11 (prescribing rules of legislative procedure), sections 15 and 16 (relating to vacancies in the Legislature and adjournments of each House), and section 23 (compensation of the members).

The Act provides that at the general election to be held on Tuesday after the first Monday in November 1962, there shall be submitted to the people of Tennessee, voting at large, the question of holding a constitutional convention limited to consideration of proposals to alter, reform or abolish these sections of Article 2 of the Constitution; and that the question shall be submitted in the form which shall be printed in full on each ballot or voting machine as follows:

"CONSTITUTIONAL REFERENDUM

Shall a convention be held to alter, reform or abolish the following provisions and subject matter of the Constitution of Tennessee, to wit: * * * [setting out the article and sections and subject matter above stated], which convention shall be limited to consideration of and action upon these sections and the subject matter hereinabove set forth, *the action of such convention to before effective as to each amendment adopted by the convention only after being separately submitted to and ratified by the voters of the State:*

FOR THE CONVENTION _____

AGAINST THE CONVENTION _____

Voters will indicate and vote by placing a cross mark opposite one or other of the above expressions." (Italics ours.)

It further provides that if a majority of the votes cast in that election (Nov. 6, 1962) shall be in favor of the convention, delegates to such convention shall be elected by the people in the general election in August 1964, "in the several counties and floterial districts and each such county and floterial district shall elect one delegate for each representative to which it is entitled in the House of Representatives of the General Assembly, at the time of the passage of this Act."

It also provides that the delegates so chosen in the election in August 1964 shall meet in convention in Nashville on the last Monday in July 1965; that such convention shall be limited to the matters aforesaid; and that any proposal the convention may adopt as to any of such matters "shall be separately submitted to the voters of the State for ratification or rejection" in an election on a date to be fixed by the convention; and that only such proposal or proposals as shall be so ratified shall become part of the Constitution.

Complainant charged in his bill that this apportionment of delegates to the convention is upon the same basis as that of the House of Representatives in the Legislative Apportionment Act of 1901 (ch. 122, T.C.A. §§ 3-101 to 3-107), which is alleged to have been held unconstitutional and void in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; and that this apportionment is likewise unconstitutional in that it un-

reasonably discriminates in favor of voters in sparsely populated rural counties and against complainant and other voters in densely populated urban counties, by giving the former proportionately more representation than the latter, and thus depriving them of their rights under the Constitution of Tennessee (Art. 1, sec. 5, Art. 11, sec. 8), and deny them "the equal protection of the laws" under the Fourteenth Amendment to the Federal Constitution.

It was further charged that by this malapportionment of delegates in the constitutional convention, the General Assembly of Tennessee intended "to devise and accomplish a scheme and plan whereby the requirements of the Constitution of Tennessee and of the United States might be circumvented and your complainant's right to reasonable equality of representation in the General Assembly of Tennessee abridged."

Officials of the cities of Memphis, Knoxville, and Oak Ridge filed intervening petitions, and were permitted to join in the bill of complainant, and adopt its allegations and prayers for relief.

Defendants denied complainants had any interest to attack the Act, denied it was unconstitutional, and averred it was merely the means provided for submitting to the people proposals to amend the Constitution, which proposals could have no effect unless and until they should be separately ratified by a vote of the people of the State at large, where every qualified voter is entitled to vote and every vote is given the same weight.

The cause was heard upon bill and the answers. The Chancellor expressed the opinion that the Tennessee Legislative Apportionment Act of 1901 was held unconstitutional and void in Baker v. Carr, supra; and upon authority of that case, he held that this 1962 Act was unconstitutional, but refused to enjoin the holding of the election under it, recognizing this principle:

> "Voters ordinarily have no such special interest in the matter as will justify them in seeking an injunction. *Further, no one can tell what the result of an election will be and no complainant can say that he will be adversely affected by an election.*" (Italics ours.) (Chief Justice

Green, Buena Vista School Dist. v. Bd. of Election Com'rs., 173 Tenn. 198, 201, 116 S.W.2d 1008.)

From that decree defendants appealed to this Court. On October 22, 1962, in advance of a hearing here, complainants presented a petition to a member of this Court to enjoin the holding of the election under this Act. That application was denied, the election was held November 6, 1962, and the convention was authorized by a vote of the majority of the people of the State voting in such election.

Thereafter, the case was heard here. The Tennessee Farm Bureau Federation, Inc., Clyde M. York and Fenner Heathcock, by able counsel, filed an amicus curiae brief in support of the Act. Defendants submit that the Chancellor erred (1) in holding the Act unconstitutional and (2) in rendering a declaratory decree to that effect, since none of those attacking the Act shows himself to be adversely affected by it.

The argument for complainant is that Baker v. Carr (369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; same case, D.C. 206 F.Supp. 341) held unconstitutional Tennessee's Act of 1901, which apportioned members in its House of Representatives upon the same basis as this 1962 Act apportions delegates to the constitutional convention; that membership in the convention is as important as membership in the House; and that an apportionment which is void as to one must be void as to the other.

I.

In Baker v. Carr, as we understand, there has been no final judgment or decision on the merits; and though no one can now say how far that case may go, we think it cannot be extended to a case like this. Complainant's reliance upon it overlooks the fundamental difference between a legislative body and a constitutional convention; and his attack on this Act is not an attack upon a legislative apportionment, like Baker v. Carr, but a challenge of the right of the people of Tennessee to amend their Constitution in the mode provided by it.

That Constitution (Art. 2, sec. 1) divides the powers of government into the Legislative, Executive, and Judicial Departments, and forbids (Art. 2, sec. 2) any person in one

department to exercise any of the powers of another; and (Art. 2, sec. 3) vests the legislative authority in a bicameral General Assembly — a Senate and a House of Representatives. Thus, the Legislature has the final power *to make law*.

A constitutional convention, however, has no power to take any final action, but can only propose constitutional changes for ratification or rejection by the people. This Act, as well as the convention it provides for, is merely part of the machinery of the amending process. In passing this Act, the Legislature exercised not its legislative power, but its special function in initiating proposed amendments to the Constitution.

Our State Constitution (Art. 1, sec. 1) declares that "*all power* is inherent in the people," and that they have a "right to alter, reform or abolish the government in such manner as *they may think proper*" (italics ours); and the only limitation placed by it on the manner of their exercise of this right, is in its provision for its amendment (Art. 11, sec. 3).

That section provides two modes of amendment: (1) by an amendment proposed by two successive Legislatures and ratified by a vote of the people (Art. 11, sec. 3, par. 1); and (2) by an act of the Legislature providing for a convention, and its submission of proposals to, and ratification by, the people, as provided in paragraph 2 of this article and section, which is as follows:

> "The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, *in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective* unless within the limitations of the call of the convention, and *unless approved and ratified by a majority of the qualified voters voting separately on such*

change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. * * *" (Art. 11, sec. 3, par. 2.) (Italics ours.)

In passing this Act (ch. 2, Acts 1962), the Legislature was acting as a special agency under the provision above quoted (Art. 11, sec. 3, par. 2), and was not exercising its legislative authority (Art. 2, sec. 3) as it did in passing the Legislative Apportionment Act of 1901 involved in Baker v. Carr. This distinction has been recognized in many authorities, a few of which we quote:

"The right to propose amendments to the Constitution is not the exercise of legislative power by the General Assembly in its ordinary sense, but such power is vested in the Legislature only by the grant found in the Constitution, and such power must be exercised within the terms of the grant." Chicago v. City of Reeves, 220 Ill. 274, 77 N.E. 237.

"In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been entrusted to it, but is merely acting under a limited power, conferred upon it by the people * * *." Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.

"A constitutional convention is not a coordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. *People who, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention.*" (Italics ours.) 11 Am.Jur., Constitutional Law, sec. 27, p. 631.

The Constitution of Tennessee recognizes the fundamental difference between the power of its General Assembly to take final action — i. e., *to make law* — and the narrowly limited power of a constitutional convention to propose changes for submission to a vote of the people. It does this by making

totally different provisions for the membership or composition of the two different bodies.

It makes provision for apportionment of the members of the General Assembly (Art. 2, secs. 5 and 6), among the several counties and districts upon the basis of the qualified voters in each; but it makes no provision for apportionment of the membership of the constitutional convention; instead, it provides the delegates "shall be chosen at the next general election * * * *in such mode and manner as shall be prescribed*"; that is, as shall be prescribed by the Legislature in the act providing for the constitutional convention.

Complainant does not, and could not, claim that this Act violates any of the provisions of the Tennessee Constitution which specify the manner in which it shall be amended, as did the legislative Act in Derryberry v. State Board of Election Com'rs., 150 Tenn. 525, 260 S.W. 102, relied on by complainant, but not in point here. As we understand, his claim is that this Act debases his vote so as to violate the state and federal Constitutions, within the holding of Baker v. Carr.

[1] The basis of that holding seems to be that a legislative malapportionment which results in persons being taxed and governed by law, without reasonably equal or fair representation, violates their constitutional rights. No such effect can be attributed to this Act. It is really not a *law* in the usual sense, not passed in the exercise of any legislative authority, but is merely a part of the amending process of the Constitution; and does not take effect by its own terms, but only upon a favorable vote of the people.

The basic principle here involved was considered in Cummings v. Beeler, 189 Tenn. 150, 223 S.W.2d 913. There, the argument was made that the Act (ch. 49, Acts 1949), providing for a limited constitutional convention, was unconstitutional because the Legislature, as the Constitution then stood, had no power to limit the convention. In overruling that contention, the Court, in an opinion by Mr. (now Chief) Justice Burnett, said:

> "The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority. The people have

> the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."
> "It is *not the legislature who limit the scope of a convention but it is the people* themselves *who by their vote under the terms of this act limit the scope of the convention.*" (Italics ours.) (189 Tenn. 175-176, 223 S.W.2d 923.)

As there pointed out by the Court, "the controlling element" in a case like this is not the legislative act, nor the constitutional convention, but the approval and ratification of the terms of the Act by the vote of the people; and the delegates to the convention "derive their whole authority and commission from such vote." Among the other cases there discussed and approved was Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49, 158 A.L.R. 495, 501, which quoted with approval this principle:

> "* * * People who, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention are presumed to *ratify the terms of the legislative call*, which thereby *becomes the basis of the authority delegated* (by the people) *to the convention.* * * *"

As we have seen, the people of Tennessee, voting not by counties and districts, but voting in the State at large, in the November 6, 1962 election, voted for the convention, as provided and constituted by this Act. The legal effect of this vote was that the people made it their act, in all its terms, including the manner of choosing the delegates to the convention. Otherwise stated, this vote of the people of the State at large must be taken as an expression of their will and as their act and deed.

In that election every qualified voter in the State was entitled to vote and every vote was given the same weight, whether the voter resided in the largest urban county or the smallest rural county. There is no claim that there was any malapportionment or any debasement of any vote; nor can it be said that this Act, as thus ratified by the people of the State, deprived complainant or any other person of any right under the Constitution of Tennessee or of the United States.

This conclusion is reinforced when it is considered that neither the delegates nor the convention can take any final action, but are strictly limited to the subjects specified in the

call, and as to them, can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large, where every qualified voter will be entitled to vote and every vote given the same weight.

II.

So, clearly, there is no ground for complainant's attack upon this Act. Of course, if the convention should propose, and the people of the State should ratify, an amendment which should be in conflict with the Federal Constitution and should adversely affect complainant, he would then have his remedy. Upon such showing by him, it would be the duty of the courts, state and federal, under the "supremacy clause," to declare such amendment void to the extent of the conflict.

But such duty can arise only after [illegible] a case has been presented. Manifestly, it is now impossible to predict, what the convention may do — what proposal or proposals it may make; and it is equally impossible to foretell whether, if any proposal or proposals are submitted, the people, by their vote, will ratify or reject them.

[2, 3] In these circumstances, it is plain that complainant's bill fails to state a cause under our Declaratory Judgments Act. That Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. Ball v. Cooter et al., 185 Tenn. 631, 634, 207 S.W.2d 340, 342; Coleman v. Henry, 184 Tenn. 550, 554, 201 S.W.2d 686; Jared et al. v. Fitzgerald et al., 183 Tenn. 682, 688, 689, 195 S.W.2d 1, 4; Newsum v. Interstate Realty Co., 152 Tenn. 302, 278 S.W. 56; Annotations, 12 A.L.R. 52, 69; 87 A.L.R. 1205, 1215-1219.

[4] It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts. Hodges v. Hamblen County, 152 Tenn. 395, 399, 277 S.W. 901; Ball v. Cooter et al., supra; Jared et al. v. Fitzgerald et al., supra.

[5] "We will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties

to the litigation. Phillips v. West, 187 Tenn. 57, 213 S.W.2d 3, 5" (State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 444, 225 S.W.2d 263, 268.) State ex rel. West v. Kivett, 203 Tenn. 49, 56, 308 S.W.2d 833.

The rule is the same, we understand, in the federal courts. "Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. Arizona v. California, 283 U.S. 423, 462, 51 S.Ct. 522, 75 L.Ed. 1154 [1169]." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 324-325, 56 S.Ct. 466, 472-473, 80 L.Ed. 688, 699.

Under the Federal Declaratory Judgment Act, as we understand, the rule is this: "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts" (citing cases). Ætna Life Ins. of Hartford Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617, 621; Electric Bond & S. Co. v. Securities & Exch. Com., 303 U.S. 419, 443, 58 S.Ct. 411, 82 L.Ed. 936, 948.

"This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' " (citing cases). United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524, 529.

For these reasons, we conclude that the Chancellor erred in holding this Act unconstitutional and in rendering a declaratory decree to that effect. The decree below is reversed, the bill is dismissed, and the costs are adjudged against complainant and the sureties on his cost bill.

ON PETITION TO REHEAR

Complainant has filed a petition for a rehearing upon our holding that his bill failed to show any invasion of any right

of his, federal or state, and failed to state a cause under our Declaratory Judgments Act (T.C.A. §§ 23-1101 to 23-1113); and, in an effort to support the petition, learned counsel make an able and earnest argument; but it is only a re-argument of matters already considered and determined by us. It points out no decisive matter of law or fact overlooked, but only re-argues matters which counsel say were improperly decided.

[6, 7] Such a petition presents no ground for a rehearing. "The office of a petition to rehear is to call the attention of the court to matters overlooked, not those things which the counsel supposes were improperly decided after full consideration." Louisville & N. Railroad Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 691, 148 S.W. 671, 680; Austin v. Jennings, — Tenn. —, 365 S.W.2d 886, 889.

The petition is denied at petitioner's cost.

APPENDIX B

CHAPTER 2, ACTS, FIRST EXTRAORDINARY SESSION OF TENNESSEE GENERAL ASSEMBLY (1962)

AN ACT to submit to the people of Tennessee the question of the calling and holding of a convention for the purpose of altering, reforming or abolishing the present Tennessee Constitution with respect to certain sections and subject matter, providing for the election to determine the will of the people with respect thereto and, if such convention be approved and called, providing for the election of delegates for the assembling and holding of such convention, fixing the compensation and expenses of such delegates, and appropriating funds to pay the expenses of said elections and conventions.

WHEREAS, Article XI, Section 3 of the Constitution of Tennessee provides:

". . . The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform, or abolish any specified part or parts of it, and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed . . ."

WHEREAS, The Legislature deems it to be in the public interest to submit to the people of Tennessee the question of whether or not the present Constitution of Tennessee should be altered, reformed, and abolished only in certain particular parts, sections, or additions, as may be determined by a convention whose authority would be limited by vote of the people to the consideration of altering, reforming, or abolishing only those parts or sections of the Constitution to which the suggested reforms would, if adopted, apply, including any additional provisions relating to such matters which might be required; and those actions in such matters shall be subject to ratification by

the people, in whole or in part, the Legislature acting merely as the designated agency to enable the people of Tennessee to determine the question of whether or not such a limited convention should be held:

NOW, THEREFORE,

SECTION 1: BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That in order to ascertain the will of the people with respect to said question, there shall be submitted to the people of the State of Tennessee at the election held in the several counties and floterial districts of the State on the Tuesday after the first Monday of November, 1962, the following question, which shall be printed in full on each ballot or voting machine, in the following words and figures:

CONSTITUTIONAL REFERENDUM

Shall a convention be held [to alter, reform, or abolish the following provisions and subject matter of the Constitution of Tennessee, to-wit: Article II, Section 3, 4, 5, 6, 7, 8, 11, 15, 16, and 23 relative to the Legislative department of state government; its authority and terms of office; the methods and means of apportioning the Representatives and Senators of such department; the time of holding elections for such offices; the time for Legislative meetings and the inauguration of the Governor; policies, quorum, and adjournments of each such House; filling of vacancies for such offices; limitations upon power of adjournment of such Houses; and the compensation of members of such department; and of Article III, Section 18, relative to the Governor's veto power; which convention shall be limited to consideration of and action upon these sections and the subject matter herein above set forth], the action of such convention to become effective as to each amendment adopted by the convention only after being separately submitted to and ratified and approved by the voters of the State?

FOR THE CONVENTION _____

AGAINST THE CONVENTION _____

Voters will indicate their vote by placing a cross mark opposite one or other of the above expressions.

If the number of votes cast for the convention shall be greater than the number of votes cast against the convention, such convention, whose authority and actions shall be limited as above provided, shall be assembled and held and delegates thereto shall be elected as hereinafter provided.

SECTION 2. BE IT FURTHER ENACTED, That the proper officers in all counties shall immediately after said elections make a return to the Secretary of State of the number of votes cast in their respective counties "For the Convention" and the number of votes cast "Against the Convention" and after comparison of the returns by the Secretary of State and the Attorney General, the Governor, shall, by proclamation, announce the results.

SECTION 3. BE IT FURTHER ENACTED, That in the event the convention shall have been authorized as above provided, delegates shall be elected at the general election which shall be held on the first Thursday in August, 1964, under the general election laws of the State in the several counties and floterial districts and each such county and floterial district shall elect one delegate for each representative to which it is entitled in the House of Representatives of the General Assembly, at the time of the passage of this Act.

SECTION 4. BE IT FURTHER ENACTED, That any citizen of the State who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five names of legally qualified voters of his or her county, and in the case of a candidate from a floterial district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his floterial district.

Every person desiring to become a delegate to the convention shall qualify as aforesaid by the filing of qualifying petition or petitions at least thirty days prior to the date of the election. The names of candidates for the delegates to the convention shall be placed on the official ballot in the same manner as candidates for the General Assembly.

The returns from the various counties of the State electing delegates to the convention shall be certified to the Secretary of State and canvassed by him and the Governor and the Attorney General in the same manner and form as the returns are required to be certified from the election in which the people vote for and against the calling of the convention, as provided in Section 1 hereof, and the Governor shall by proclamation announce the names of those elected as delegates to the convention. Delegates to the convention elected and certified as hereinbefore provided shall receive a certificate of election signed by the Governor and attested by the Secretary of State under the Great Seal of the State.

SECTION 5. BE IT FURTHER ENACTED, That the delegates elected to the convention shall assemble in the chamber of the House of Representatives at Nashville on the last Monday in July, 1965, and organize by electing one of their members as president, another as secretary, and by electing such other officers as they may deem necessary. But if a majority of the delegates shall not be present on that date, those present shall adjourn from day to day until a majority appears, when the convention shall be organized. The convention when organized may adopt its own rules of procedure and employ such clerks, stenographers, reporters, sergeants-at-arms, and other assistants as the convention may deem necessary and fix the amount of their compensation.

The compensation of the members of the convention shall be ten dollars ($10.00) for each day of attendance upon the convention and an expense allowance of five dollars ($5.00) for each such day and they shall be allowed the same travel expense as is now allowed to members of the General Assembly which shall be paid by the State in the same manner that members of the General Assembly are paid upon due certification by the president and secretary of the convention. Payment of all of these items, together with such incidental expenses as may be necessarily incurred by the convention, shall be upon state warrant drawn by the Director of Accounts on the Treasurer upon certification of the president and secretary of the convention.

In case there should be a vacancy in the membership of the convention from any county or floterial district, such

vacancy shall be filled by election by the other members of the convention or another qualified member from the county or district in which the vacancy occurs.

SECTION 6. BE IT FURTHER ENACTED, That it shall be the duty of the Secretary of State to make due publication of the fact that a constitutional convention election is to be held in the state on the Tuesday after the first Monday of November, 1962, and he shall also certify to the various election commissioners of the different counties the form for the ballot with reference to the constitutional convention election agreeable to the terms of this Act and furnish said election commissioners with any other necessary printed information pertaining to the election that he may deem material or necessary. In the event the people vote in favor of the convention, then it shall be the duty of the Secretary of State to issue a call for the election of delegates to the convention, said election to be held in the various counties of the State on the first Thursday in August, 1964, and the Secretary of State shall certify the form of the ballot to the various county election commissioners to be used in said election of delegates.

All expenses incurred by the Secretary of State in connection with either or both of these elections shall be paid by the Commissioner of Finance and Administration on warrant drawn upon the Treasurer upon certification of the Secretary of State to the correctness of each account. All ballots used in the November, 1962 General Election shall include the said question as to holding the Limited Constitutional Convention and the ballots used in the August, 1964 election shall include the names of the Candidates for delegates to such convention.

SECTION 7. BE IT FURTHER ENACTED, That the final action of the convention with respect to the alteration, reformation, abolishment or amendment of the sections and the subject matter of the Constitution of Tennessee as hereinbefore set out shall be duly certified by the president and the secretary of the convention and such original certified copy shall be transmitted to the Secretary of State for preservation among the official records of the State.

SECTION 8. BE IT FURTHER ENACTED, That each amendment to the constitution adopted by the convention shall be separately submitted to the voters of the State for ratification

or rejection of each separate amendment at an election to be held in such manner and on such date after the final adjournment of the convention as may be fixed and determined by the convention. If, for any reason, the convention itself does not call such election, then the General Assembly next convening shall call an election for this purpose, fixing the date for the election and the form of the ballot that shall be used therein; but it is expressly provided that the official ballot to be used in this election shall be so arranged as that the voter can vote separately for the ratification or rejection of each and every amendment. Any election so held shall be held under the general election laws of the State.

When an election to ratify or reject any amendment or amendments to the Constitution has been thus held, the various county election commissioners shall certify the result thereof in each county to the Secretary of State, who, together with the Governor and Attorney General, shall canvass the returns and the Governor shall issue a proclamation showing the result of said election on the ratification or rejection of said amendments. All amendments ratified and approved in the election held for that purpose shall be proclaimed by the Governor as a part of the Constitution of the State and his proclamation shall be filed in the office of the Secretary of State.

SECTION 9. BE IT FURTHER ENACTED, That all expenses in connection with the holding of any of the elections herein authorized shall be paid by the Commissioner of Finance and Administration on warrant drawn upon the Treasurer upon certification of the Secretary of State to the correctness of each account; but no compensation shall be paid by the State to the various county election commissioners for their services or for rental space or quarters in the various counties for places for holding any election herein authorized.

SECTION 10. BE IT FURTHER ENACTED, That this Act take effect from and after its passage, the public welfare requiring it.

APPENDIX C

BEN WEST, MAYOR, ETC.		IN THE
vs. NO. 84263		CHANCERY COURT,
JOE C. CARR, SECRETARY OF STATE, ET AL.		PART ONE, AT NASHVILLE.

MEMORANDUM

This is a suit by Ben West, Mayor of Nashville and as a voter, seeking a declaration of rights. He seeks to enjoin the election of November 6th, 1962, calling for a vote on a Constitutional Convention, and to declare Chapter 2, Acts of the First Extraordinary Session, 82nd General Assembly 1962 unconstitutional and void.

Under the authority of Baker v. Carr, the complainant has a right to maintain this suit for a declaratory judgment.

The application for an injunction in this cause is denied. Under our Tennessee law and the facts of this case I must deny the granting of the injunction to enjoin the election for a Constitutional Convention.

No trial court of this State really determines the Constitutionality of an Act of our Legislature, because the trial court merely gives its opinion as to constitutionality and our Supreme Court makes the real and final determination. An opinion and a final determination are two vastly different things. To prevent an election on the opinion of a trial judge is a gamble. The trial courts do not know what is constitutional or what is unconstitutional until the Supreme Court passes upon the question.

Also it is not the prerogative of the trial courts to make new law. Even though the trial judges may greatly disagree with certain laws and rulings it is their obligation to follow the law as it is. New laws and rulings are made by the Legislature and our Appellate Courts. So as in the famous case of Baker v. Carr the trial court followed the law as it was, and the Supreme Court of the United States made new law when it reversed the trial judges.

In denying this injunction I must follow the ruling of our Supreme Court in School District v. Board of Election Commissioners, 173 Tenn. 198. In this case the Court held:

"(2) The chancellor was therefore correct in his conclusion that the Act of 1937 was unconstitutional. An injunction was granted, however, restraining the election commissioners from holding the election authorized by said Act. In this we think the chancellor went too far.

"(3) It is quite generally declared that a court of equity will not enjoin the holding of an election. Voters ordinarily have no such special interest in the matter as will justify them in seeking an injunction. Further, no one can tell what the result of an election will be and no complainant can say that he will be adversely affected by an election. Some courts refuse an injunction on a broader ground that the power to hold an election is a political power and that equity has no jurisdiction to restrain officers entrusted by law with the duty of holding elections from exercising such power. High on Injunctions, sections 1286, 1316, 1425; 32 C. J., 255; Note, 40 L. R. A. (N.S.), 576; Note, 33 A. L. R., 1376."

I do not think our trial judges can disregard the opinions of our Appellate Courts and follow the holding of a Federal District Trial Court as I am asked to do in this case. Sims v. Frink does not take precedence over the School Board case.

Also there will be time for our Supreme Court to pass upon the Constitutionality of the Act in question. If, relying upon my own opinion, I enjoined the election on the ground of unconstitutionality and our Supreme Court decided otherwise, I would then have thwarted the right of the people to vote on the Convention.

I am of the opinion that said Chapter 2 is unconstitutional. In Baker v. Carr, Chapter 122, Public Acts 1901 was declared void. In the enactment of Chapter 2 the Legislature passed, in effect, another Chapter 122, Public Acts 1901. The membership of a Constitutional Convention is just as important as the membership of the Legislature. If the malapportionment is void as to the Legislature, it is also void as to a Constitutional Convention.

The cost is taxed to the defendant.

Decree accordingly.

NED LENTZ, *Chancellor*

[illegible] 8th, 1962

APPENDIX D

SECTION 3. AMENDMENTS TO CONSTITUTION.—Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the general assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people at the next general election in which a Governor is to be chosen. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house.

The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may

be fixed by the convention. No such convention shall be held oftener than once in six years. [As amended: Adopted in Convention May 27, 1953; Approved at election November 3, 1953; Proclaimed by Governor November 19, 1953.]

Article 11, Section 3, TENN. CONST.

I, Harris Gilbert, one of the attorneys of record for Ben West and others, appellants herein, depose and say that on the 24th day of December, 1963, I served a copy of the foregoing jurisdictional statement on George F. McCanless, appellee herein, and the attorney for the appellees, by mailing the same to him in a duly addressed envelope with postage prepaid, the address being George F. McCanless, Esq., Attorney General for the State of Tennessee, 401 Seventh Avenue, North, Nashville, Tennessee.

HARRIS GILBERT
Attorney for Appellants
1310 Nashville Bank and Trust Building
Nashville, Tennessee

Sworn to and subscribed before me,
this _____ day of December, 1963.

_____
Notary Public

My commission expires: _____

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

BEN WEST, et al.,	Appellants,	No. 37,670. On Appeal from the Supreme Court of the State of Tennessee.
vs.		
JOE C. CARR, et al.,	Appellees.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Garner v. Louisiana, 368 U. S. 157, 166, 169, 82 S. Ct. 248, 253-254, 7 L. Ed. (2) 207, 216 6

Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459,

Kingsley Int. Pic. Corp. v. Regents of N. Y. U., 360 U. S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. (2d) 1512, 1516 6

Louisville & N. Railroad Co. v. Woodford, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202 4

Statutes Cited.

Public Acts of 1962, Chapter 2 ..... 2, 3, 4, 5, 7, 8, 9

Tennessee Code Annotated:

Secs. 23-1101-1113 ..... 2, 3, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

BEN WEST, et al.,	Appellants,	No. 37,670. On Appeal from the Supreme Court of the State of Tennessee.
vs.		
JOE C. CARR, et al.,	Appellees.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Appellees move to dismiss the appeal to this Court on the following grounds:

(a) Judgment rests on an adequate non-federal basis;

(b) There is not presented a substantial federal question; and

(c) Appellant has no standing in this Court to challenge the state statute involved.

Consideration of the motion requires a statement of the case as follows:

STATEMENT OF THE CASE.

This suit was brought by Ben West as Mayor of the City of Nashville and as a voter and taxpayer of Davidson County, Tennessee, under the Tennessee Declaratory Judgments Act (Tennessee Code Annotated, Sections 23-1101 to 1113) seeking a decree enjoining the holding of a referendum election in November, 1962, which statewide election was to be held under the principle of one person, one vote, to determine whether the voters favored the holding of a Constitutional Convention, and also seeking a judgment declaring that said statute is unconstitutional.

The challenged Act, being Chapter 2 of the Public Acts of 1962, was passed on June 7, 1962. It is an Act submitting to a vote of the people of Tennessee, in one of the modes prescribed by the Constitution of Tennessee, proposals to alter, reform or abolish certain parts[1] of said Constitution.

The Act provides that at the General Election to be held on Tuesday after the first Monday in November, 1962, there shall be submitted to the people of Tennessee, voting at large, the question of holding a Constitutional Convention limited to consideration of proposals to alter, reform or abolish specified sections of the State Constitution.

It further provides that if a majority of the votes cast in that election (November 6, 1962) shall be in favor of the convention, delegates to such convention shall be elected by the people in the general election in August, 1964, "in the several counties and floterial districts and each such county and floterial district shall elect one dele-

[1] In Tennessee the Legislature may submit to popular referendum the matter of holding a constitutional convention with power to propose amendments to the State Constitution, restricted to specified sections or provisions of the State Constitution. Cummings v. Beeler, 189 Tenn. 151, 223 S. W. (2d) 913.

gate for each representative to which it is entitled in the House of Representatives of the General Assembly, at the time of the passage of this Act."

It also provides that the delegates so chosen in the election in August, 1964, shall meet in convention in Nashville on the last Monday in July, 1965; that such convention shall be limited to the matters aforesaid; and that any proposal the convention may adopt as to any of such matters "shall be separately submitted to the voters of the State for ratification or rejection" in an election on a date to be fixed by the convention; and that only such proposal or proposals as shall be so ratified shall become part of the Constitution.

The effort to enjoin the holding of an election at which the voters would express their wishes as to a constitutional convention failed, the courts below deciding that in line with prior decisions a court in Tennessee has no power to enjoin the holding of an election except under unusual circumstances not present in this case. The election was held and a majority of the voters of Tennessee voted in favor of holding the proposed constitutional convention. Such was the result in a statewide election held under the principle of one person, one vote, and with every qualified voter of Tennessee entitled to vote.

The trial court (Chancery Court of Davidson County, Tennessee), while refusing to enjoin the holding of the referendum election in 1962, expressed the opinion that said Chapter 2, Acts of 1962, was unconstitutional.

On appeal, the Supreme Court of Tennessee reversed and dismissed the suit, holding that Appellant's Bill of Complaint failed to state a cause of action under the Tennessee Declaratory Judgments Act. The Tennessee Supreme Court in its Opinion on Petition to Rehear, also said that Appellant's Bill of Complaint "failed to show an invasion of any right of his, federal or state."

ADEQUATE NON-FEDERAL GROUND.

The Supreme Court of the United States from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

Louisville & N. Railroad Co. v. Woodford, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202;

Fox Film Corp. v. Muller, 296 U. S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159;

Flournoy v. Wiener, 321 U. S. 253, 262, 64 S. Ct. 548, 553, 88 L. Ed. 708, 715;

Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459, 464, 89 L. Ed. 789, 794;

Black v. Cutter Laboratories, 351 U. S. 292, 298, 76 S. Ct. 824, 827, 100 L. Ed. 1188, 1197.

The stated principle is applicable and decisive here because the judgment on appeal rests on an adequate state ground, to wit: the interpretation by the Tennessee Supreme Court of the Tennessee Declaratory Judgments Act.

The statute here challenged, Chapter 2 of the Public Acts of Tennessee of 1962, provides for a constitutional convention to be held if the voters in a statewide referendum election approve the holding of the same. The statute also provides for the delegates who shall compose the convention.[2] The statute further provides that the constitutional convention when assembled may recommend to the voters for acceptance or rejection amendments to specific provisions of the Tennessee Constitution, and if the voters approve the proposed amendments, they will become part of the State Constitution.

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[2] As hereinafter discussed, it is the provision with respect to delegates composing the constitutional convention which appellant claims to render the Act unconstitutional.

The proceeding on appeal here in the present case was instituted **before** the voters had voted in the referendum election in favor of the convention, **before** the delegates to the convention were to be chosen, **before** the members of the convention had submitted to the electorate any proposed amendments to the State Constitution, and **before** the people by favorable vote had adopted any amendments to the Tennessee Constitution. Even at the present time none of the recited contingencies has taken place except that the voters, in the referendum election held in November 1962, approved the holding of the constitutional convention provided for by Chapter 2, Public Acts of 1962.

The judgment of the Tennessee Supreme Court was that "in these circumstances" the Bill of Complaint fails to state a cause of action under the Tennessee Declaratory Judgments Act, that said Act "deals only with present rights that have accrued under presently existing facts", that Tennessee courts have "no power to determine rights or possible controversies in anticipation of events that may not occur" and that the Tennessee Declaratory Judgments Act "does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts."

The judgment of the Tennessee Supreme Court was consistent with and in accord with its prior and uniform interpretation of the Tennessee Declaratory Judgments Act, as evidenced by the numerous prior decisions of such Court cited in its Opinion in the case at bar.

To reverse the judgment hereinabove summarized, it would be necessary for this Court to decide and determine that the Tennessee Supreme Court has misconstrued and misapplied a state statute (the Tennessee Declaratory Judgments Act), the constitutionality of which is not challenged nor involved here, but under a principle so

well settled as to be axiomatic, the Supreme Court of the United States must accept the construction which the state court has put upon a state statute.

Aero Mayflower Co. v. Board of Railroad Commissioners, 332 U. S. 495, 499-500, 68 S. Ct. 167, 169-170, 92 L. Ed. 99, 105;

Albertson v. Millard, 345 U. S. 242, 244, 73 S. Ct. 600, 602, 97 L. Ed. 983, 985;

Kingsley Int. Pic. Corp. v. Regents of N. Y. U., 360 U. S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. (2d) 1512, 1516;

Garner v. Louisiana, 368 U. S. 157, 166, 169, 82 S. Ct. 248, 253-254, 7 L. Ed. (2) 207, 216;

Cramp v. Board of Pub. Inst. of Orange Co., Fla., 368 U. S. 278, 285, 82 S. Ct. 275, 279-280, 7 L. Ed. (2d) 285, 291.

There is no claim in the Jurisdictional Statement and there would be no basis for such claim if made, that the non-federal ground of the state court's decision, to-wit, the proper construction of the Tennessee Declaratory Judgments Act was a mere pretext or cloak to evade decision of a federal question. On the other hand, the Opinion of the Supreme Court carefully pointed out:

> ". . . if the convention should propose, and the people of the State should ratify, an amendment which should be in conflict with the Federal Constitution and should adversely affect complainant, he would then have his remedy. Upon such showing by him, it would be the duty of the courts, state and federal, under the 'supremacy clause', to declare such amendment void to the extent of the conflict.
>
> "But such duty can arise only after such a case has been presented. Manifestly, it is now impossible to predict what the convention may do—what proposal or proposals it may make; and it is equally impossible to foretell whether, if any proposal or proposals are

> submitted, the people, by their vote, will ratify
> reject them."

In summary, it is submitted that the judgment
appeal of the Tennessee Supreme Court rests upon
adequate non-federal basis and that this Court will
decide that a state court has erroneously interpreted
own state statute and having so decided pass upon
constitutionality of another state statute (Chapter
Public Acts of 1962) involving possible future rights
contingencies.

NO SUBSTANTIAL FEDERAL QUESTION.

The second ground of appellees' motion to dismis
that there is lacking any substantial federal questio

Appellant's contention that Chapter 2, Public Acts
1962 violates the equal protection clause of the F
teenth Amendment is fairly summarized by the Ten
see Supreme Court as follows:

> "The argument for (appellant) is that Baker
> Carr (369) U. S. 186, 7 L. Ed. (2); same case,
> F. Supp. 341) held unconstitutional Tennessee's
> of 1901, which apportioned members in its House
> Representatives upon the same basis as this 1962
> apportions delegates to the constitutional convent
> that membership in the convention is as importan
> membership in the House; and that an apportionm
> which is void as to one must be void as to the othe

The difficulty with appellant's argument is that
analogy between a permanent legislative body and a si
constitutional convention is incomplete and the distinct
are both striking and important.

As the Supreme Court of Tennessee points out,
analogy overlooks the fundamental difference betwee
legislative body and a constitutional convention and ap

lant really is challenging the right of the people of Tennessee to amend their Constitution in the mode provided by it.

The Legislature in Tennessee has the final power **to make law.** The constitutional convention in Tennessee has no power to make law, nor to take any other final action. It can only propose constitutional changes for ratification or rejection by the people. It can do this only when a statewide election has by favorable vote authorized the delegates to the convention to be elected and to assemble.

An Act authorizing such constitutional convention, as well as the convention it provides for, is merely part of the machinery of the amending process. In passing such Act as Chapter 2, Public Acts of 1962, the Legislature is not exercising the legislative authority but is acting as a special agency under the Tennessee Constitution to set in motion the amendatory process which ultimately culminates in an election at which the proposed amendments are accepted or rejected.

The Tennessee Supreme Court further points out in its Opinion that the State Constitution "recognizes the fundamental difference between the power of its General Assembly to take final action—i. e., **to make law** and the narrowly limited power of a constitutional convention to propose changes for submission to a vote of the people" and it does this by making totally different provisions for the membership or composition of the two different bodies. As to the General Assembly, members are to be apportioned "upon the basis of the qualified voters." As to the constitutional convention, delegates are to be chosen **"in such mode and manner as shall be prescribed"** by the legislature.

The Tennessee Supreme Court then quoted from an earlier decision by it (**Cummings v. Beeler**, 189 Tenn. 151, 175-176, 223 S. W. 2d 913, 923, as follows:

"The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all state authority. The people have the ultimate power to control and alter their constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."

"It is **not the legislature who limit the scope of a convention but it is the people themselves who by their vote under the terms of this act limit the scope of the convention.**" (Emphasis by the Court.)

The Tennessee Supreme Court further points out that as regards Chapter 2, Public Acts of 1962, "the controlling element" is neither the legislative act nor the constitutional convention, "but the approval and ratification of the terms of the Act by the vote of the people," and the delegates to the convention derive their whole authority and commission from such vote.

Finally, the Tennessee Supreme Court emphasizes that, unlike a legislature, the constitutional convention and its delegates can take no final action. They are strictly limited to the subjects specified in the call and as to these can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large, where every qualified voter will be entitled to vote and every vote given the same weight.

The Opinion of the Tennessee Supreme Court has pointed out so clearly and decisively the lack of substance in appellant's argument that prolonged discussion is inappropriate. Appellant has nothing to fear except that a majority of the people of Tennessee, acting in exact conformity with the procedure provided in the State Constitution, will put something in such Constitution which

appellant finds objectionable and that such provision, undesired by him, will be held constitutional and in conformity with all guarantees of the Federal Constitution. To protect against this possibility, appellant sought to deny the voters of Tennessee the right to express their desires at the polls. Having been rebuffed by the courts in an effort to secure an injunction against the election and having been rebuffed by the qualified voters of Tennessee who approved the holding of a constitutional convention, appellant continues to seek to destroy the convention before it can make proposals which appellant opposes and which the electorate **may** approve!

Appellees submit that the case at bar does not present a substantial federal question.

APPELLANT IS WITHOUT STANDING IN THIS COURT.

Appellees' motion to dismiss has for its third ground that appellant has no standing in this Court to attack the constitutionality of Chapter 2, Public Acts of Tennessee for 1962.

Whether the appellant has standing to attack the state statute in this Court is an issue to which this Court brings its independent judgment. The controlling question is, whether the appellant "has sustained or is immediately in danger of sustaining some direct injury as a result of (the statute's) enforcement . . . ." **Cramp v. Board of Pub. Inst., Orange County, Fla.**, 368 U. S. 278, 282-283.

Obviously, appellant has sustained as yet no injury by reason of said Chapter 2. Delegates to the Constitutional Convention have not been elected nor assembled. *A fortiori*, the Convention has recommended no constitutional changes and the electorate has ratified or approved no such changes.

It is equally clear that appellant is in no **immediate** danger of sustaining a **direct** injury. What changes, if any, in the Tennessee Constitution will be recommended by the Convention is speculative and uncertain. Whether any changes, if recommended by the Convention, will be adopted by the electorate in a statewide election, held under the principle of one person, one vote, is equally speculative and uncertain. Whether a change, if recommended and adopted, will adversely affect appellant cannot be judged until the nature and extent of the change is decided. In other words, under established principles, the appellant has no standing in this Court at the present time to attack the constitutionality of Chapter 2, Public Acts of Tennessee for 1962.

Respectfully submitted.

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State of Tennessee.

THOMAS E. FOX,
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State of Tennessee.

I certify that I forwarded a copy of this Motion to Dismiss and Brief in Support Thereof to Mr. Harris A. Gilbert, Attorney at Law, Nashville Bank and Trust Company, Nashville, Tennessee, on this the 16 day of January, 1964.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.